appellants by virtue of section 392 itself without having to invoke the provisions of section 397 because the robbery was committed between sunset and sunrise.

The framing of the charges in this case and the subsequent conduct of the proceedings in court left much to be desired. The administration of criminal law is not to be treated light-heartedly but is to be carried out seriously with a sense of dedication and with great care and attention.

Order accordingly.

Solicitors: *Syarikat Datuk Balwant Singh; Gunaretnam & Co.*

TAISHO MARINE & FIRE INSURANCE CO. LTD. v. WONG POO PENG & ORS.

[O.C.J. (Mohamed Azmi J.) April 29, 1975]
[Kuala Lumpur — Civil Suit No. 5 of 1974]

Practice and Procedure — Application to set aside default judgment — Defence on merits — Guarantee — Release — Contracts Act, 1950, s. 91.

The third defendant applied to set aside a judgment in default of appearance entered against him. The third defendant had stood as guarantor with the second defendant for the first defendant a partner of S.P. & Low Agencies in respect of payment of insurance premiums. It was alleged (1) that the third defendant had not been properly served with the writ of summons and (2) that the letter of guarantee had been automatically revoked when the constitution of the partnership of S.P. & Low Agencies was changed.

Held: (1) on the facts the writ of summons had been properly served on the third defendant;

(2) that the guarantee in this case was not joint but several but even assuming that it was a joint guarantee the common law principle that a release of a joint guarantor without the consent of the other would release him from his obligation under the bond is not applicable in this country because of section 91 of the Contracts Act, 1950;

(3) the applicant had not shown a *prima facie* defence on the merits in law or in fact and therefore the application must be dismissed.

Case referred to:-

(1) *Song Bok Yoong* v. *Ho Kim Poui* [1968] 1 M.L.J. 56.

CIVIL SUIT.

K. Y. Chew for the defendant/applicant.

J. Somasundaram for the plaintiff/respondent.

Mohamed Azmi J.: This is an application by Summons-in-Chambers dated April 29, 1974 by Low Kim Yee, the third defendant, to set aside a Judgment In Default Of Appearance in the sum of $49,182.34 and costs at $120 entered against him on March 15, 1974. Low Kim Yee and the second defendant, Lim Hee Hong, stood as guarantors for the first defendant, who is a partner of the firm of S. P. & Low Agencies, in respect of payment of insurance premiums due from the said Agencies to the plaintiff. By specially indorsed writ, the plaintiff sued the three defendants for the adjudged sum of $49,182.34.

Before me, it is argued by the third defendant/applicant that he was in fact not served with the writ of summons on February 21, 1974 at 3.15 p.m. at Room 307, Third Floor, Kwang Tung Association Building, No. 44, Jalan Pudu, Kuala Lumpur, as alleged in paragraph 4 of affidavit of service of Teo Kim Tiang, the process server, affirmed on February 27, 1974. Secondly, it is contended that, even if the service was good, he has a good defence to the plaintiff's claim on the ground that the letter of guarantee dated May 13, 1968 (Exhibit "NAM 1" attached to the further affidavit of Mr. Norman Alexander Marjoribanks affirmed on April 25, 1975) was automatically revoked once the constitution of the partnership of S. P. & Low Agencies was changed on August 1, 1970.

On the first ground, the applicant is relying mainly on the affidavit of Mok Wee Meng affirmed on August 29, 1974 who is an architect trading under the name of Messrs. Lee & Mok Chartered Architect. He affirms that he has been in occupation of Room 307, Third Floor, Kwang Tung Association Building, Jalan Pudu, since November 1, 1973, and that on February 21, 1974 when the writ was alleged to have been served on the applicant, he is not aware of the writ being served in Room 307 on the applicant, and nor has he ever seen or has any knowledge of the said writ of summons in his office. By paragraph 4 of the applicant's supporting affidavit affirmed on August 29, 1974, the applicant also denies that he has ever accepted service or process of the writ from Teo Kim Tiang, the process server, and neither has he ever seen the process server nor a copy of the writ of summons. In short, it is the contention of the applicant that since Room 307 was not occupied by him in February 1974 but by the architect, Mok Wee Meng, the writ of summons could not have been personally served on him in that room by the process server on February 21, 1974.

In this case, it is not in dispute that the applicant was in occupation and the tenant of Room 307 prior to November 1, 1973. Learned counsel for the respondent/plaintiff submits that there is no evidence to show any change of tenancy from the applicant to the architect on November 1, 1973. The receipt for the month of February 1974 marked "MWM-1" annexed to the affidavit of the architect is not, it is argued, sufficient to prove any change of tenancy. Further, the said receipt was only signed by the recent collector and not by the landlord. Failure to produce the tenancy agreement implies that the applicant is still the legal tenant and in occupation of Room 307 at the material time.

On the balance of probabilities in the evidence, I have come to the conclusion the writ of summons was in fact served on the applicant at Room 307 on February 21, 1974 as alleged by the process server. I must also reject the evidence deposed in paragraph 4 of the applicant's affidavit dated August 29 that he had never seen the process server or the copy of the writ of summons. In my view, at all material times, Room 307 is the only normal address of the applicant, and there is nothing improbable that the applicant was in Room 307 on February 21, 1974 at 3.15 p.m. having regard to the following facts. Firstly, from the affidavit of Mr. Norman Alexander Marjoribanks affirmed on November 1, 1974, it is clear from the letter of guarantee dated May 13, 1968 signed by the applicant that his address is at Room 307. (See exhibit marked "NAM 3"). His address remained the same in October 1973 as shown by the letter of demand, a

copy of which was sent to the applicant by A. R. Registered. (See exhibit marked "NAM 2"). Again, his address remained the same in July 1974 as evidenced by the letter sent to the applicant marked "NAM 4" and A.R. card marked "NAM 5". Even as recent as August 6, 1974, it is obvious from the letter of the applicant's own solicitors marked "NAM 6" that the applicant was still in occupation of Room 307. I accept these documentary exhibits as more reliable than the contents of the affidavits affirmed by the applicant and the architect. In the event, I hold that at all material times the applicant was in occupation of Room 307 and that he had been properly served with the writ of summons at the said room on February 21, 1974, as alleged by the process server.

On the second ground that the letter of guarantee has been automatically revoked, I am of the view that having regard to the form of the letter of guarantee executed by the applicant, it is not a joint guarantee with the second defendant, but several. Even assuming that it is a joint guarantee, section 91 of the Contracts Act, 1950 (Revised — 1974) provides:

"Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties."

As such, I accept the submission of learned counsel for the respondent that English authorities on common law principle that the release of a joint guarantor without the consent of the other would release him from his obligation under the bond is not applicable in this country. [See *Song Bok Yoong* v. *Ho Kim Poui*].[1] In the circumstances, the respondent has a legal right to proceed against the applicant although the other guarantor (the second defendant) has been discharged. The applicant has not, therefore, shown a *prima facie* defence on the merits either in law or in fact.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Chew & Co.; Lovelace & Hastings.*

ELECTRICAL INDUSTRY WORKERS UNION v. REGISTRAR OF TRADE UNIONS & ANOR.

[O.C.J. (Chang Min Tat J.) May 8, 1975]
[Kuala Lumpur — Originating Summons No. 354 of 1974]

Practice and Procedure — Originating Summons — Membership of trade union — Construction of rules — Trade Unions Ordinance, 1959, s. 2(2) — R.S.C. 1957, O.54 r.1 and O.54A.

This was an application by originating summons for construction and interpretation of the rules of a trade union and section 2(2) of the Trade Unions Ordinance Act 1959 and for a declaration *inter alia* that the applicant union had the exclusive right to decide whether members employed by a company was within the scope of membership of the said union under its rules. Objection was taken to the form of the action.

Held: the construction of the rules of a trade union could not come within O.54 r.1 of the R.S.C. The objection was well founded and therefore the application must be struck out and the applicants be given leave to proceed by action.

Case referred to:-

(1) *Sungai Wangi Estate* v. *Uni* [1975] 1 M.L.J. 136.

ORIGINATING SUMMONS.

D. P. Vijandran for the applicants.

Zaleha bte. Zahari (Federal Counsel) for the respondents.

Chang Min Tat J.: This was an application by Originating Summons under the provisions of Order 54A of the Rules of the Supreme Court for certain declaratory orders. The first two orders sought involved the construction of Rule 3(1) of the Rules of the Electrical Industry Workers Union and the next two the interpretation of section 2(2) of the Trade Unions Ordinance, 1959.

The declarations asked for, as amended, are in these terms:—

"a) A declaration that the Applicant Union has the exclusive power to decide whether the workers employed by the company registered as Monsanto Electronic Sdn. Bhd. are within the scope of membership of the said Union under Rule 3(1) of the Union's Rules.

b) A declaration that the said Union is entitled to register the said workers as its members.

c) A declaration that the Registrar of Trade Unions is not empowered under section 2(2) of the Trade Unions Ordinance, 1959 or at all to rule on the eligibility of the said workers to join the said Union.

d) A declaration that the Registrar of Trade Unions has no power under section 2(2) of the Trade Union Ordinance or at all to forbid the said Union from taking in the said workers as its members."

The matter arose from the attempt by the Union to absorb into its fold the workers employed by Monsanto Electronics Sdn. Bhd. The Union thought that these workers came within its membership clause, as being persons engaged in similar trades, occupations or industries. The Registrar of Trade Unions thought otherwise. In his view electronic was not synonymous with electrical and a worker employed by that firm did not come within the definition of worker in the Union's rules. He therefore refused to allow the enlistment of the workers of the Monsanto Electronics Sdn. Bhd. into the Electrical Industry Workers Union.